BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSE A. HIGH	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,362
DELUXE CHECK PRINTERS, INC.	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the Award of Administrative Law Judge Robert H. Foerschler dated October 20, 1998. In the Award, the Administrative Law Judge denied claimant additional benefits, finding claimant had failed to prove that the diagnosed fibromyalgia condition was in any way related to the work accident of June 3, 1994. Oral argument was held June 2, 1999.

APPEARANCES

Claimant appeared pro se. Respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award are adopted by the Appeals Board.

ISSUES

The following issues were raised by claimant through a series of letter briefs to the Board:

(1) Did claimant suffer personal injury by accident arising out of and in the course of her employment on the date alleged?

(2) Was timely written claimant submitted pursuant to K.S.A. 44-520a?

(3) What was claimant's average weekly wage on the date of accident?

(4) Was an independent medical examination ever ordered by the Administrative Law Judge with Dr. Vito J. Carabetta? (At oral argument to the Board, respondent agreed the medical examination provided by Dr. Carabetta was done at the request of respondent's attorney and not pursuant to an independent medical examination request by the Administrative Law Judge as was erroneously stated in the Award.)

(5) Were appropriate records provided to claimant as ordered in the preliminary hearing Order of February 2, 1998?

(6) Was claimant denied due process for not being allowed the opportunity to present additional evidence to the Administrative Law Judge?

Respondent raised the following issues in its brief to the Board:

(1) Are the statements, documents and exhibits referenced by claimant in her letter brief to the Board properly a part of the record and available for consideration by the Appeals Board, even though not previously admitted into evidence pursuant to K.S.A. 1998 Supp. 44-555c?

(2) Has claimant failed to meet her burden of proof?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent on May 18, 1994. Claimant alleges she suffered accidental injury while working for respondent on June 3, 1994. On that date, claimant was working on what was called the folio machine which claimant described as being as large as the hearing room. At the time of the alleged accident, claimant was a trainee on the folio machine. She was rethreading the machine with tape when her right

hand came into contact with the internal workings of the machine. She alleges she received an electric shock and, for a moment, was unable to remove her right hand from the machine. While her hand was stuck to the machine, she described a tingling sensation. The only outward evidence of injury was a blister on claimant's finger, near her ring.

At the time of the incident, claimant screamed. Her scream was heard by her supervisor, John Schauer. When Mr. Schauer came over, claimant told him she was okay and, when asked, advised she could continue to work. Mr. Schauer allowed her to take a break before she returned to the folio machine. Mr. Schauer came around later that night asking if claimant was okay, and she advised that she "guessed so." She acknowledged her hands still kind of tingled, but she was not sure if it was because of the shock or simply because she was afraid and shaky from the incident. Claimant experienced a substantial amount of fatigue that night.

By approximately June 23, 1994, claimant felt so tired that she went to the doctor. Also, her low back began to hurt. At first, she thought she had a bladder infection, but tests proved negative. Shortly after that, she began having migraine headaches, which she had earlier experienced at the time of her hysterectomy three years ago. However, she had not had headaches since the hysterectomy and appeared to be in reasonably good health. Shortly after the accident, claimant began going straight to bed after work and was tired all of the time.

On Sunday, October 2, 1994, after taking a nap, claimant attempted to go to work. She had a severe headache and was sick to her stomach. After she began vomiting, her husband took her to the hospital emergency room. Claimant was diagnosed with possible carbon monoxide poisoning, although this diagnosis was never confirmed. Claimant went through a series of tests, including spinal taps and MRIs, to rule out migraine headaches and meningitis. None of the tests were definitive. Claimant was ultimately diagnosed with fibromyalgia.

Because of claimant's attendance problems due to her health difficulties, claimant was released from her employment with respondent. Claimant's last day worked was approximately September 29, 1994. Shortly thereafter, with the aid of an attorney, claimant discovered that she was eligible for sick pay, which she received through April 7, 1995.

On December 27, 1994, after claimant contacted respondent about the fibromyalgia and reported that she related it to the shock incident of June 3, 1994, an accident report was filed with the Division. The parties acknowledge claimant submitted written claim in this matter on March 7, 1995. While claimant obtained legal assistance in obtaining the sick leave benefits, claimant has elected to represent herself in this workers' compensation matter.

While claimant was examined and treated by numerous physicians, the only medical deposition taken was that of Dr. Vito J. Carabetta, a physical medicine and rehabilitation specialist. Claimant took no depositions of medical experts.

On May 26, 1999, prior to the oral argument to the Appeals Board, claimant filed a letter brief, alleging she was denied due process for not being allowed the opportunity to present additional evidence in this matter. This matter went to regular hearing before the Administrative Law Judge on February 17, 1998. At that time, respondent's attorney advised claimant and the Court that he would be scheduling claimant for a medical examination with Dr. Carabetta. Respondent acknowledged at oral argument to the Board that the comment by the Administrative Law Judge in the Award that Dr. Carabetta's examination was court ordered was inaccurate. Dr. Carabetta examined claimant on March 4, 1998. The attorney for the respondent also advised claimant and the Court that respondent would be deposing Dr. Carabetta, but would not be deposing Gary G. Berger, D.O., a physical medicine and rehabilitation specialist, who had examined and treated claimant for the fibromyalgia.

Terminal dates were set, with claimant's being April 30, 1998, and respondent's being June 1, 1998. The deposition of Dr. Carabetta was taken by respondent on March 24, 1998. On April 22, 1998, claimant filed a request for an extension of her terminal date. This request was granted, and claimant's terminal date was extended to June 1, 1998, with respondent's correspondingly extended to July 1, 1998. On May 26, 1998, claimant filed a second request for extension of her terminal date. Claimant's request was again granted, with her terminal date extended to August 3, 1998, and respondent's correspondingly modified to September 3, 1998.

On September 3, 1998, on the last day of its terminal date, respondent filed a submission letter with the Administrative Law Judge. Claimant immediately followed with a submission letter dated September 22, 1998. No additional extensions were requested by claimant and no depositions were taken by claimant.

A dispute arose between the parties regarding the amount of electricity required to run the folio machine and what, if any, damage claimant may have suffered after being shocked by this machine. In the preliminary hearing Order of February 2, 1998, Administrative Law Judge Foerschler ordered respondent to provide to claimant copies of any and all records, instructions, manuals, blueprints or specifications of the folio machine. The machine in question was a custom-made machine, manufactured by Check Technology in Minnesota. The maintenance records on the particular machine in question were only maintained for a year, and by the time the parties proceeded to the January 1998 preliminary hearing, the records for the machine involved in the 1994 accident were no longer available. In addition, respondent had sold the machine in question and the remaining machines, according to claimant's testimony, had been modified to some degree. Part of the problem in this case stems from the fact that claimant's accident occurred in 1994, and the parties did not proceed to preliminary hearing until February

1996, nearly two years later. In addition, respondent was not ordered to provide the information until nearly four years after the date of accident, through the February 2, 1998, preliminary Order.

Respondent argues the only electricity involved in the operation of the folio machine was a current of 4.6 amps driven by a voltage of 1.6 volts, which is approximately the voltage of a single AA battery. The Administrative Law Judge found it incredible that a machine of the size described by claimant could be run by such a minuscule power source, and the Appeals Board agrees. However, there is no indication in the record as to what was actually involved in the running of this machine.

Claimant has filed several letter briefs to the Board, with medical documentation attached to several of those briefs. Respondent argues the evidence attached to claimant's briefs is inadmissible, as the attachments were not provided to the Administrative Law Judge as required by K.S.A. 1998 Supp. 44-555c. Respondent further argues claimant has failed in her burden of proving a connection between her diagnosed fibromyalgia and the accident of June 3, 1994.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 44-508(g).

Claimant alleges accidental injury on June 3, 1994, when she suffered some type of electric shock sensation while in contact with the folio machine. Claimant describes the incident and also discusses the fact that she reported this incident to her supervisor, Mr. Schauer. Respondent provides no contradictory evidence regarding the circumstances surrounding the accident. The Appeals Board, therefore, finds claimant's testimony uncontradicted and that claimant has proven that she suffered accidental injury on June 3, 1994, while working for respondent. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

With regard to claimant's average weekly wage, claimant's testimony is uncontradicted that she was making $7.90 per hour on the date of accident. This computes to a wage of $316 per week. A wage statement, attached to claimant's letter brief, indicates claimant also was receiving dependent life, group life and dental insurance through respondent. However, the attachments do not show which portion of the benefits were paid for by claimant and which were provided by respondent. Therefore, claimant has failed in her burden of proving which portion of the benefits were provided by respondent, as is required by K.S.A. 44-511. Claimant also argues that she was making $8.07 per hour in October 1994. However, K.S.A. 44-511(b)(4) requires the average

weekly wage to be "at the time of the accident." Respondent argues that a stipulation had been entered that claimant's average weekly wage was $280.80. The regular hearing transcript, page 4, defeats this assertion. Respondent had the opportunity to present a wage statement, had it been so inclined, and failed to do so. The Appeals Board, therefore, adopts claimant's testimony that she was making $7.90 per hour on the date of accident and finds claimant's average weekly wage to be $316 per week.

Claimant alleges respondent failed to provide records and documents as ordered by the Court. The problem appears to be due to the lapse of time. The Order by the Administrative Law Judge came nearly four years after the date of accident. Records associated with the maintenance of the machine are no longer available. In addition, the machine in question has been sold and the remaining machine has been modified in its design. The Appeals Board finds that respondent did not violate the Administrative Law Judge's Order. Respondent was unable to comply due to the lapse of time and the destruction of records years earlier.

Whether the statements, documents and exhibits, attached to claimant's briefs, should be considered and whether claimant was denied due process for not being allowed the opportunity to present additional evidence will be considered as one issue. This matter went to regular hearing on February 17, 1998, at which time claimant and the Court were advised of respondent's intentions to schedule claimant with Dr. Carabetta and also to depose Dr. Carabetta. Respondent also advised that Dr. Berger's deposition would not be taken. Terminal dates were scheduled, and claimant was granted two extensions of her terminal date. No medical depositions were ever scheduled by claimant and no medical reports were stipulated into evidence by the parties. While medical reports supporting claimant's contentions were admitted into evidence at preliminary hearing, and were properly considered by the Administrative Law Judge at preliminary hearing, K.A.R. 51-3-5a prohibits medical reports from being considered as evidence at the time of a final award unless the parties either stipulate to the reports or unless the records, reports or statements are later supported by the testimony of a physician, surgeon or other person making the record, report or statement.

K.S.A. 44-519 also prohibits reports of health care providers from being considered as competent evidence absent the testimony of the health care provider. While claimant offers numerous medical reports for consideration, claimant's requests violate both K.A.R. 51-3-5a and K.S.A. 44-519.

Claimant alleges that her due process rights were violated for having lost the opportunity to provide additional medical evidence. The record shows that claimant was provided substantial time to submit any evidence she so desired. K.S.A. 44-523 allows for the submission of all evidence by the claimant no longer than 30 days after the first full hearing before the administrative law judge. Extensions of time are granted if certain criteria are met. In this instance, claimant requested and was granted two extensions of

her terminal date. However, for reasons unknown, claimant elected to take no depositions and submitted no evidence prior to her submission letter of September 22, 1998.

K.S.A. 1998 Supp. 44-555c(a) allows for review by the Board upon questions of law and fact as presented to the administrative law judge. The statute requires that the evidence be presented, had and introduced before the administrative law judge before it can be considered by the Board. The evidence attached to claimant's letter briefs to the Board were not provided to the Administrative Law Judge. Therefore, pursuant to K.S.A. 44-523, K.S.A. 1998 Supp. 44-555c and K.A.R. 51-3-5a, the Appeals Board finds the evidence attached to claimant's letter briefs to the Board were not properly submitted and cannot be considered by the Board on review. Therefore, claimant was not denied her due process rights.

As was noted by the Administrative Law Judge, the only medical opinion properly before either the Administrative Law Judge and the Board regarding the cause of claimant's fibromyalgia condition is that of Dr. Vito J. Carabetta. The Board notes that the Administrative Law Judge erred in stating that Dr. Carabetta was a court-ordered independent medical examiner, rather than the expert provided by respondent. However, the opinion of Dr. Carabetta is, nevertheless, properly before this Board for consideration. Dr. Carabetta, in his report of March 4, 1998, found no evidence that would indicate that the injury sustained by claimant made any significant contribution to the fibromyalgia condition from which claimant was currently suffering. Therefore, while it is found that claimant suffered accidental injury on June 3, 1994, there is no credible medical evidence which associates claimant's fibromyalgia condition to this injury.

The Appeals Board, therefore, finds that claimant has failed in her burden of proving the nature and extent of her injury and disability from the June 3, 1994, accident, and the Administrative Law Judge's Award, denying claimant additional benefits, is affirmed.

However, medical treatment was provided for the injury sustained on June 3, 1994. Outstanding medical bills for the treatment of the burn on claimant's hand are awarded to claimant from respondent. Payment for the treatment of claimant's fibromyalgia is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated October 20, 1998, should be, and is hereby, modified, and claimant, Rose A. High, is granted medical treatment as above awarded, but is denied an award of any permanent partial compensation against the respondent, Deluxe Check Printers, Inc., and its insurance carrier, Travelers Insurance Company, for the accidental injury sustained June 3, 1994.

Costs associated with the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Hostetler & Associates, Inc.	$871.70
Metropolitan Court Reporters, Inc.	$250.50
Richard Kupper & Associates	$324.05

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Rose A. High, Cleveland, MO
Stephen P. Doherty, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director